Bricklayers & Allied Craftsmen, Local 6, AFL-CIO (Key Waterproofing Co., Inc.) *and* Robert L. Gumbel. Case 3-CB-4116

13 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 16 August 1983 Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bricklayers & Allied Craftsmen, Local 6, AFL-CIO, Albany, New York, its officers, agents, and representatives, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] In his decision, the judge stated that the record failed to establish that the Respondent had any policy or contract provision prohibiting the employment, as rank-and-file employees, of individuals who were or had been contractors. The Respondent, in its exceptions, notes that art. XVIII of the contract specifically prohibits "lumping" (i.e., the receiving of lump payment for a particular job). The Respondent argues that, even if its business agent had requested, as alleged, that employee Robert Gumbel be discharged, the request was an attempt to enforce this contractual provision. Although the contract prohibits "lumping," we are not convinced that the Respondent was motivated by any honest and reasonable belief that Gumbel was "lumping." Further, we agree with the judge and find no evidence of restrictions, either in the contract or local union rules, on the employment of former contractors. However, even if we read the contract to prohibit this employment practice, we would nonetheless find that the Respondent's actions were not motivated by a concern over this matter.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause Key Waterproofing Company, Inc., or any other employer, to discharge or otherwise discriminate against Robert Gumbel or any other employee, because of his failure to pay to us or to our funds moneys which we or the funds assert that said employee owes to us or because of any other arbitrary or invidious reasons.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Robert Gumbel whole for any loss of pay he may have suffered as a result of our discrimination against him, with interest.

WE WILL notify Key Waterproofing Company, Inc., in writing, and furnish a copy of such notification to Robert Gumbel, that we have no objection to Gumbel's employment by said Employer.

WE WILL notify Robert Gumbel that we have removed from our files, and have asked the Employer to remove from the Employer's files, any reference to his discharge and that we will not use the discharge against him in any way.

BRICKLAYERS & ALLIED CRAFTSMEN, LOCAL 6, AFL-CIO

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge: The hearing in the above case was heard before me in Albany, New York, on October 5, 1982.[1] The complaint, as amended, alleges that Bricklayers & Allied Craftsmen, Local 6, AFL-CIO, herein called the Respondent, on or about August 31, attempted to cause and did cause Key Waterproofing Company, Inc., herein called the Employer or Key, to discharge its employee Robert L. Gumbel, herein called Gumbel or the Charging Party, because of personal hostility by Dominick Spano, the Respondent's agent, toward Gumbel and/or because of arbitrary and invidious considerations, and for reasons other than Gumbel's failure to tender periodic dues and initiation fees uniformly required as a condition of requiring or retaining membership in the Respondent, in violation of Section 8(b)(1)(A) and (2) of the Act.

A brief has been received from counsel for the General Counsel and has been carefully considered.

Based on the entire record,[2] including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a New York corporation with its main office in Colonie, New York, and various other places of business and facilities in New York State, including a construction site in Cairo, New York, herein

[1] All dates hereinafter are in 1982 unless otherwise indicated.

[2] The unopposed motion filed by the General Counsel to correct the transcript is hereby granted, as set forth in Appendix B. [Omitted from publication.]

called the Cairo site, where it is engaged in the business of providing and performing waterproofing, caulking, and related services. During the past year, the Employer in the course and conduct of its business provided services valued in excess of $50,000 for other enterprises within the State of New York, including Alekira Construction Inc., Beltrone Construction Co., and Unit Span Building Systems, which other enterprises each performed services valued in excess of $50,000 in States other than the State of New York. Key is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted and I find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS

Gumbel has worked as a caulker and an estimator for 20 years. From 1962 to 1966 he was a member of the Respondent. In 1973 Gumbel became a partner in a corporation called Castaways Caulking Inc. Said corporation was signatory to an associationwide contract with various locals of the Bricklayers Union in the area including the Respondent. In 1978 Gumbel became the sole owner of Castaways.

In 1979 Castaways was audited by the Capitol Area Masons Welfare and Pension Funds. The audit determined that Castaways owed the funds $14,000 in contributions. Gumbel asserted that Castaways was not responsible for these payments, since they covered employees who although members of the Respondent were working outside the geographical area covered by the contract for the period when the funds claimed contributions for them. In fact Gumbel asserts that payments were made on behalf of such employees to the funds located in the areas in which the work was performed.

Initially the funds obtained a default judgment on its claim against Castaways. However, subsequently, Castaways obtained an attorney, who succeeded in obtaining a reopening of the proceeding, which is currently pending in Federal District Court.

According to Gumbel, as a result of pressure from the Respondent, because of this dispute, Castaways was unable to obtain any work, so it ceased operations in November 1979.

Since that time, Gumbel was employed as a caulker for various contractors located in Binghamton and White Plains, New York, and in Glen Cove, Long Island.[3] Since November 1982, Gumbel was employed on and off by Countrywide Caulking Corporation in Albany, New York, as an estimator. Since 1979 he has been a member of Local 28 of the Bricklayers Union.

Key is a corporation which is owned and operated by Michael Kilcullen. Key is signatory to an associationwide contract which includes the Respondent as one of the parties. The contract contains a union-security clause, which requires membership in the Union after 7 days of employment. The contract also contains a provision that the Respondent agrees to furnish, if available, employees if requested by the Employers. The Employers shall give at least 48 hours' notice when requiring employees. The contract further stated, "the right of the employer to employ persons of his own selection shall not be questioned."

According to Kilcullen neither this clause nor any other provision in the contract obligates him to go through the Respondent first before hiring any employees. Indeed, Kilcullen testified that he has frequently hired employees in the past on his own. However, Kilcullen also testified that he normally does notify the Respondent when he has hired employees.

Key obtained a subcontract from Unit Span Construction to perform caulking and waterproofing at a jobsite in Cairo, New York. In June, Key completed the first phrase of the job. Kilcullen performed this work himself, along with employee Chuck Diamond who was a member of the Respondent. In late June, Kilcullen sustained an injury and was incapacitated from performing the next phase of the job.

At that time Gumbel was unemployed and heard about Kilcullen's inquiry. He called Kilcullen sometime in early August, on the phone, and after inquiring about Kilcullen's injury asked if Kilcullen needed any help to complete the job. Gumbel informed Kilcullen that he as well as his daughter (Julie Wenz) and son-in-law (Jud Stine), both of whom had worked with him at his last job with Sampson Window Corp., were also available for employment. Kilcullen replied that he might have some work for them on the Cairo project, and that he would get back to Gumbel when the work was ready to be performed.

On or about Friday, August 27, Kilcullen called Gumbel, and they went together to the Cairo jobsite in order to show Gumbel the site, the scope of the work, and what work had to be done. At the jobsite Gumbel and Kilcullen discussed the work that had to be done and the manner in which it would be performed. Gumbel again told Kilcullen that his son-in-law and daughter were unemployed and also available for work and asked if they would be hired. Kilcullen asked how long it would take to complete the job with the three of them. Gumbel responded 4 to 5 days. Kilcullen answered that was about what he had figured, and he told Gumbel that he could start work on Monday, August 30, with his son-in-law and daughter. Gumbel informed Kilcullen that he wished to be treated as an employee, so as to build up his unemployment credits. Kilcullen agreed and said that Gumbel, Stine, and Wenz would each be paid $14 per hour which is the union contract rate for caulkers. Kilcullen also informed Gumbel that he would take care of the fringe benefit contributions to the union funds for the three employees. Gumbel and Kilcullen discussed the amount of materials needed and came to an agreement on how much was necessary. The materials were bought and paid for by Kilcullen.

Kilcullen and Gumbel also discussed briefly the third phase of the job, which consisted of the ground joints.

[3] None of these jobs was located within the Respondent's geographical area.

Kilcullen stated that it was taken for granted that Gumbel would get involved in that phase of the work if Kilcullen could not do it.[4] There was no discussion between Kilcullen and Gumbel as to the extent of Gumbel's authority on the job, such as whether he could hire or fire employees, adjust grievances, or other such powers. Kilcullen testified however that in his view Gumbel was in "complete control of the job." In fact the general contractor, Unit Span, was notified that Gumbel could be Key's representative on the jobsite.

On Monday and Tuesday, August 30 and 31, Gumbel, Stine, and Wenz performed work at the jobsite. Gumbel spent most of his time doing caulking as did his daughter Wenz. Stine, his son-in-law, acted as a helper, mixing materials, moving ladders, packing joints, and preparing joints for caulking. Gumbel also admits that he acted as more or less the "foreman," by telling Stine and Wenz where to start and which work would be performed first, and checked their work to see if it was done properly. Wenz has been working in the field since 1979, while Stine's experience as a helper had been about a year and a half. Gumbel's instructions to them were based on his greater experience in the industry.

Key paid all three employees in cash at the rate of $14 per hour, which was normal practice for Key's employees. W-2 forms were prepared for all three setting forth the appropriate deductions for state, Federal, and social security taxes, and Key forwarded the appropriate amounts to such agencies.

Kilcullen did not make the contributions required for these employees to the Union's funds as he had promised he would do. However, Kilcullen testified that was because he was in arrears. In fact Key also became in arrears with respect to contributions for employee Diamond for work performed by Diamond with Kilcullen on the third phase of the job.

About 12 noon on August 31, Dominick Spano, the Respondent's business agent, came to the jobsite. Spano approached Gumbel and asked, "What are you doing here?" Gumbel replied that he was caulking. Spano asked who he was working for, and Gumbel answered Key Waterproofing. Spano asked Gumbel if he was "lumping,"[5] to which he replied no, that he was working on an hourly basis.

Spano then responded, "you're not going to work here, you're not going to work in my territory," and added that Gumbel owed Spano a lot of money. Gumbel replied that he had a paid-up union book and offered to show it to Spano. Spano responded, "take that book and shove it up your ass, I don't want to see your book, you're not going to work in my territory." Spano again mentioned the money allegedly owed by Gumbel to the Union, and Gumbel answered that the matter was in the hands of the courts, and suggested that they let the courts decide.

Spano also mentioned that Stine did not have a union "book." Gumbel replied that Stine was a helper, not a caulker and therefore did not need a book. Spano made no reply to this assertion of Gumbel. Spano then went to the office of the general contractor and then left. Gumbel continued working until 2:30 to 2:45 p.m. when he ran out of materials.[6]

Later on that day, Kilcullen received a call from David Zygmon, his estimator, who informed him that Andy Martello, the Respondent's vice president and an administrator of Capital Area Masons Welfare and Pension Funds, had called, and instructed Kilcullen to get in touch with Spano. Thereupon, Kilcullen called Martello at the Respondent's hall. Martello informed Kilcullen that Spano had been at the jobsite and that Spano was upset because Gumbel was on the project with two people, one of whom did not have a book. Martello added, "in view of the past this is just adding more trouble to a situation where Mr. Gumbel had a habit of bringing people that were non-union members on the job and that he was upset about it." Martello instructed Kilcullen to call Spano that evening, and get the matter straightened out.

Later that evening Kilcullen called Gumbel and informed him that Kilcullen had heard there was a problem at the jobsite between Gumbel and Spano. Gumbel confirmed the fact that Spano had been there, and was upset with Gumbel's being on the job. Kilcullen asked about the employee's not having a book and Gumbel replied that the employee was a helper and not a caulker. Kilcullen then informed Gumbel that he would be speaking to Spano later that evening, but, until the matter was straightened out, it would be better if Gumbel and the other employees left the job. Kilcullen told Gumbel that as it stood that he would finish the job himself, but he would get back to Gumbel after he talked with Spano.[7]

Later on that evening, Kilcullen spoke to Spano on the phone. Spano began by telling Kilcullen that Gumbel was on the jobsite and that one of the other people with him did not have a book. Kilcullen replied that he was under the impression that the employee had a book, but Spano responded that the worker had admitted to him that he did not have one. Spano added that he could file a grievance against Kilcullen for allowing a nonunion employee on the job. Spano also claimed that Gumbel was still in business, but Kilcullen replied that he was working as an employee for Key.[8]

Spano then asked Kilcullen if he were aware of the fact that there were problems between the Respondent and Gumbel. Kilcullen responded that he understood

[4] The third phase of the job consisted of 2 to 3 days' work.

[5] Lumping is an industry term which is similar to subcontracting.

[6] The above is derived from the unrefuted testimony of Gumbel. Spano did not testify.

[7] The above is what I believe to be the most probable version of his conversation, as derived from a synthesis of three different versions of this discussion offered by Kilcullen during the hearing. While at one point Kilcullen claimed that he had definitely made up his mind to terminate Gumbel and so informed Gumbel at that time, other portions of his testimony as well as his letter subsequently written to Gumbel, see infra, indicate to the contrary. Thus in my judgment, Kilcullen made only a tentative decision at that time to remove Gumbel, pending his conversation with Spano, and that he so informed Gumbel of same. I note particularly Kilcullen's testimony that he told Gumbel that "we better terminate this right now until I find out what . . . ."

[8] The collective-bargaining agreement in effect between the Respondent and Key contains a provision that requires Key to subcontract only to subcontractors who are signatories to the contract or whose employees are represented by various other unions. Spano made no reference to this clause nor any other clause in the contract when speaking to Kilcullen.

that the problems had been ironed out and, since Gumbel had been working as an employee for other companies, Kilcullen felt it was all right to hire him. Spano responded that the problem had not been solved, that there was an ongoing battle between them, because Gumbel was delinquent in paying welfare and pension. Spano continued that, if it were up to him, Gumbel "wouldn't be working here or anywhere." Kilcullen informed Spano that he had already dismissed Gumbel from the job, and that Gumbel would not be performing any more work on the project.

Later on that same evening about 11 p.m. Kilcullen called Gumbel. Kilcullen told Gumble that Spano was up in arms because Gumbel was working at the site, and that Kilcullen did not realize that Spano hated Gumbel as much as Spano did. Kilcullen said that it would be better if Gumbel gets off the job, and that Kilcullen would finish the job himself. Kilcullen added that he was not going to get in trouble with Spano. Gumbel responded that he agreed with Kilcullen, because "you can't fight the Union. I've been trying to fight them for years and it's just tough."

On September 1, Kilcullen sent a letter to Gumbel explaining why it was necessary to remove him from the job. According to Kilcullen he sent the letter to cover himself in case Gumbel took action against Kilcullen for terminating Gumbel from the project.

The letter reads as follows:

> Dear Robert:
>
> Please be advised that I received a telephone call last night from Business Agent Dominick Spano. I was told by him that you are not to work on any construction projects in this area, and if it were up to him, you were not to work in this state at all.
>
> The reasons for this, he said, are that you owe a lot of money to his local, and that you had brought a non-union worker with you on this job. His anger toward you was brought to the force by statements such as, "You are a no-good liar," and that you stole from your employees.
>
> As you can surely understand, I have no alternative but to finish this project with other forces. Until you clear up this matter, I cannot have you do any work for this company.
>
> I hope that you realize I cannot afford to in any way alienate myself with Dominick, especially in your behalf. The alternatives would be devastating to me.
>
> I am sorry, but this is the way it must be.

The second and third phases of the project were completed by Kilcullen himself along with employee Diamond, who had worked with him on the first phase of the job before Kilcullen's injury. The second phase was done by Kilcullen while he was still on crutches. The record does not reflect when the third phase was completed, nor whether Kilcullen was still injured at that time.

IV. ANALYSIS

A. *Gumbel's Status*

The Respondent argues that the record established that Gumbel was acting as a subcontractor or independent contractor on the job, or at the very least a supervisor of the Respondent and is therefore not subject to the protections of Section 8(b)(2) of the Act.

With respect to the independent contractor issue, the standard applied by the Board in such cases is the common law right to control test as set forth by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 259 (1968). Under this test an employer-employee relationship exists when the employer reserves the right to control not only the result to be achieved but also the means to be used in attaining the result. The test requires an analysis and balancing of the facts in each case. *Capital Parcel Delivery Co.*, 256 NLRB 302, 303 (1981).

An analysis of the relevant facts in the instant case leads me to conclude, which I do, that Gumbel was at all times material herein an employee of Key Waterproofing and not an independent contractor. Initially it must be noted that Gumbel signed no written agreement with Key. The Board has held that oral agreements, providing for individual services which are readily terminable, are inconsistent with independent contractor status. *Prentiss & Carlisle Co.*, 230 NLRB 373, 374 (1977); *A. Paladini, Inc.*, 168 NLRB 952, 953 (1967). Additionally, Gumbel was paid the same hourly salary as the other employees pursuant to the terms of the collective-bargaining agreement between Key and the Respondent. See *Lucky Stores*, 243 NLRB 642, 644 (1979). Furthermore, Key, by submitting W-2 and other forms to the appropriate governmental agencies, has represented itself that it is the employer of Gumbel. *Prentiss & Carlisle*, supra at 374.

While it is true that Kilcullen was not present at the jobsite, and he referred to Gumbel as having "control of the job," in fact Kilcullen had met with Gumbel prior to the commencement of work, and had laid out the work to be done and how it was to be performed. All the materials used on the job were bought and paid for by the Respondent. Thus, Gumbel has not been shown to have a significant entreprenurial interest in his working arrangements. *Lucky Stores*, supra at 644: *B & F Cartage*, 251 NLRB 645, 651 (1980). It is clear that, unlike the genuinely independent businessman, Gumbel's earnings do depend on his ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase his profits. *Standard Oil Co.*, 230 NLRB 967, 972 (1977).

Accordingly, I find that Gumbel was an employee of Key within the meaning of Section 2(3) of the Act.

Turning to the issue of Gumbel's alleged supervisory status, the Respondent relies on Gumbel's assignment of work and control of the jobsite, as well as his role in the hiring of his daughter and son-in-law by Key in order to establish same. With respect to Gumbel's assignment of work, and being in charge of the other two employees, I find these functions do not clothe Gumbel with sufficient

supervisory authority to conclude that he is a supervisor under Section 2(11) of the Act. Thus, Gumbel spends most of his time performing production work alongside the other employees, and his terms and conditions of employment were controlled by the contract. Moreover, it has not been shown that his assignment of work and responsibility for seeing that the job is completed properly run to other than standard routine operations, or that Gumbel exercises any significant independent judgment in the course of his work performance. Any such authority exercised by Gumbel in this area relates to his skills and experience as a caulker. *Risdon Mfg. Co.*, 195 NLRB 579, 581 (1972); *Iroquois Telephone Corp.*, 169 NLRB 344, 345 (1968); *Laborers Local 341 (Bannister-Joyce-Leonard)*, 223 NLRB 917, 919 (1976).

Gumbel's role in the hiring of his son-in-law and daughters presents more troublesome questions, as it is clear that Gumbel recommended that Kilcullen hire them, and that Kilcullen accepted his recommendation without any further inquiries, investigation, or interviewing of these employees. However, not every effective recommendation to hire employees transforms the one who makes such a recommendation into a supervisor within the meaning of the Act. Thus it is necessary to demonstrate that independent judgment and discretion have been utilized in making such a recommendation. *Washington Post Co.*, 254 NLRB 168, 189 (1981); *Magnolia Manor Nursing Home*, 260 NLRB 377, 385 (1982); *Wisconsin Beef Industries*, 249 NLRB 256, 262 (1980). The record does not establish that Gumbel exercised any independent judgment in recommending the hire of his son-in-law or daughter.

Moreover, to the extent that the hiring arrangement herein may be viewed as bestowing on Gumbel the authority to effectively recommend personnel action, it is basically limited and personal authority exercised not in the interests of Key, but in Gumbel's own interest to suit his own particular needs and desires (i.e., the hiring of his close relatives) and to preserve the harmonious relationship within the work crew. *Lipsey, Inc.*, 172 NLRB 1535 (1968); *Brewery Workers (Gulf Bottlers)*, 298 F.2d 297 (D.C. Cir. 1961); *Kenosha News Publishing Corp.*, 264 NLRB 270 (1982); *Norac Lumber Co.*, 234 NLRB 572 (1978); *Willis Shaw Frozen Food Express*, 173 NLRB 487, 488 (1968); *Scott Paper Co.*, 171 NLRB 821 (1968).

Accordingly, I find that it has not been demonstrated that Gumbel was a supervisor of Key within the meaning of Section 2(11) of the Act.

B. *Whether the Respondent Caused or Attempted to Cause Key to Terminate Gumbel*

The Respondent argues that it did not cause or attempt to cause Key to discharge Gumbel, but rather that Kilcullen made up his mind to terminate Gumbel on hearing that he had a nonunion employee on the job with him, and because Kilcullen feared that he had violated his contract. I do not agree. As noted above, I have found that, while Kilcullen did tell Gumbel to leave the job before speaking to Spano, his decision was only tentative at that time pending his discussion with Spano and that this was so communicated to Gumbel. It is noted that, at the time of his conversation with Gumbel, Kilcullen was aware of the fact that Spano had been at the jobsite and had objected to Gumbel's presence therein. Thus, when he spoke to Spano later on in the evening, Spano although not specifically requesting Gumbel's termination reaffirmed his opposition to Gumbel and the Respondent's problems with him, and stated that "if it was up to him Gumbel wouldn't work here or anywhere." In these circumstances, particularly where the Respondent was a party to a collective-bargaining agreement with the Respondent, and where Kilcullen testified that he did not wish to get in trouble with Spano, it is clear that the Respondent's conduct herein amounted to an "efficacious request" that Key discharge Gumbel, which satisfies the term "cause or attempt to cause" as used in the Act. *Electrical Workers IBEW Local 262 (Arthur Paul Jr. Electrical Contractor)*, 264 NLRB 251 (1982); *Stereotypers (Dow Jones)*, 175 NLRB 1066 (1969); *Teamsters Local 294 (Rubber City Express)*, 204 NLRB 700, 701, 702 (1973). See also *Painters Local 1627 (Johnson's Plastering Co.)*, 233 NLRB 820, 821 (1977), where the Board held that a union caused an employer not to hire an individual, notwithstanding the absence of a direct demand that he not be hired.

C. *Whether the Respondent's Causing Key to Discharge Gumbel was in Violation of the Act*

As quoted in *Operating Engineers IUE Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), reversed on other grounds 496 F.2d 1308 (6th Cir. 1974). See also *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432 (1983).

> When a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

The issue for resolution is therefore whether the Respondent has been able to overcome or rebut the presumption of illegality of its actions, by showing that its conduct was either in the enforcement of a valid union-security clause or that it was necessary to the effective performance of representing its constituency. Since neither Spano nor any other official of the Respondent testified herein, its reasons for its actions have not been clearly articulated. However, a number of possible reasons are not suggested by the record.

There is evidence in the record that Spano objected to the fact that employee Stine did not have a "book." While the Respondent's contract with Key does contain a union-security clause, it is clear that its actions were

not in furtherance or enforcement of that provision. At no time did the Respondent demand or request that Kilcullen replace Stine with a union member. Indeed the entire thrust of the Respondent's actions was to remove Gumbel from the job, and the fact that Stine was also terminated was incidental to the Respondent's conduct.[9] Therefore the fact that Stine may not have had a "book" provides no basis for the Respondent to object to Gumbel's presence, who admittedly did have a book and in fact had offered to show it to Spano.[10]

The record also contains some testimony concerning the existence of a 48-hour notice provision in the contract. However, it appears from reading the provision and Kilcullen's testimony that Key is not required to go through the Respondent to obtain employees. In any event, there is no evidence in this record that the possible violation of this clause in the contract in any way motivated the Respondent's actions. Thus, Spano never mentioned the clause to either Kilcullen or Gumbel during his conversations with them, nor does the record even suggest that this provision in the contract was being enforced by the Respondent in its demand that Key discharge Gumbel.

There is some evidence in the record that Spano asked Gumbel if he was "lumping" the job, and then later claimed to Kilcullen that Gumbel was "still in business." This raises the possibility that the Respondent was motivated in its action by a belief that Gumbel was operating as a subcontractor. The Board has found that a refusal to refer an employee because of an established union policy against referring individuals who are also contractors is not unlawful. The Board reasoned that the Union's rule was legitimate and reasonable, in that it is an effort to assure that employment opportunities for those who, day in and day out, are rank-and-file employees, are not prejudiced by competition from those who have operated as contracting employees. *Carpenters Local 1080 (Commercial Contracting Corp.)*, 201 NLRB 882 (1973). See also *Painters Local 1075 (Carr Glass & Paint Co.)*, 190 NLRB 388, 389 (1971); *Marquette Mfg. Co.*, 213 NLRB 182 (1974). In *Operating Engineers IUE Local 825 (AGC of New Jersey)*, 187 NLRB 50, 53 (1970), this theory was extended to a situation where the union merely had an honest and reasonable belief that the individual not referred was operating as a contractor and was therefore outside the unit, and where the evidence revealed no other arbitrary considerations were involved in the union's actions.

However, in my judgment the facts on this record do not permit the Respondent to take solace in nor rely on the holdings in the above cases. Initially it must be emphasized that contrary to the above-cited cases, where the record revealed the existence of an established union policy either in the contract itself,[11] or by evidence of local union rules,[12] the record herein fails to establish that the Respondent had any such policy or contract provision against employees who are or were contractors working or that it was attempting to enforce any prohibition against such activity.

Moreover, as noted above I have found that Gumbel was not in fact working as a contractor on the jobsite, but as an employee. I also conclude that the Respondent did not have an honest or reasonable belief that Gumbel was so acting. The evidence is unrefuted that Gumbel had not acted as a contractor since 1979, some 3 years earlier, when Castaways ceased operations. When Spano asked Kilcullen and Gumbel about the matter he was told by both individuals that Gumbel was acting as an employee for Key. The record does not reveal that Spano made any investigation of this issue, nor that he had any basis to support his purported belief that Gumbel was still in business, or was operating as a contractor. In fact, an examination of Spano's conversations with Kilcullen and Gumbel convinces me that Spano's reference to Gumbel's being in business and his complaint about Stine's not having a "book" were mere pretexts, seized on by Spano to mask his true motivation in seeking the discharge of Gumbel. I find that the evidence establishes that the real reason for Spano's dissatisfaction with Gumbel was the fact that the Respondent claimed that he owed them $14,000 back pension and welfare moneys as a result of his association with Castaways. I rely on, in this regard, Spano's comments to Kilcullen that if it were up to him Gumbel would not work anywhere, right after assuring Kilcullen that the problem involving the pension and welfare payments had not been solved, as well as Spano's statement to Gumbel that "you're not going to work in my territory," while telling him that he owes Spano a lot of money.

Accordingly it then becomes necessary to detemine whether the Respondent may lawfully cause Key to discharge Gumbel because of the funds' pending claims against Castaways, a corporation with which Gumbel was associated. Thus, it must be decided if the action was necessary to the effective performance of its function of representating "its constituency." *Ohio Contractors*, supra. I note that the Respondent has made no such showing. Indeed the Respondent presented no testimony whatsoever on the issue of why it caused Key to terminate Gumbel, nor as to how its conduct was necessary to the performance of its representative function.

The Board in *Plasterers Local 5 (John P. Phillips Plastering)*, 145 NLRB 1608 (1964), faced a similar issue, and found that a union may not lawfully cause an employee to be terminated because of a corporate debt owed to the union by a corporation that the employee had been involved with.[13]

[9] I note that the complaint does not allege nor does the General Counsel contend that the Respondent unlawfully caused the discharges of Stine or Wenz.

[10] I note also in this regard that even as to Stine, the union-security clause provides a 7-day grace period. Stine was only employed by Key for 2 days.

[11] *Carr Glass*, supra.

[12] *Commercial Contracting*, supra; *AGC of New Jersey*, supra; *Marquette Mfg.*, supra.

[13] In *Phillips*, supra, the debt involved was deducted from the wages of employees by the corporation and not forwarded to the union. The amount was $1,187.15 which was admittedly owed by the corporation and was listed in the schedule of the corporation debts in its bankruptcy proceeding.

The Board affirmed the then Trial Examiner's decision, which held that "whether the employee was normally obligated to pay this debt is not the issue." Id. at 1622. Indeed in the instant case it is not even clear whether Gumbel was morally obligated to pay the debt or in fact whether there was a debt at all. Gumbel asserted that he did not owe any money to the funds, since the payments requested were for work performed outside the jurisdiction of the Local and that he had made payments to other funds for these employees. Gumbel's defenses in this regard may or may not be viable and I need not and do not make any finding in this regard. However, it is clear that the matter is still pending before the Federal District Court and that it is at least possible that Castaways as a corporation, much less Gumbel as an individual, may not owe anything to the funds, when the litigation is finally completed.

Moreover, the Board has consistently held that a union violates Section 8(b)(1)(A) and (2) of the Act when it seeks to interfere with the employment opportunities of members, who fail to pay admittedly legitimate union fines[14] or assessments.[15] Thus, it would seem to follow that if a union cannot lawfully cause an employee to be terminated because he refuses to pay a clearly legitimate fine or assessment for which the employee is individually liable, that it similarly cannot do so because an individual as here refuses to pay a debt to the union funds which may or may not be valid, and which is a debt that runs only to the corporation and not to the individual. Such conduct by the Respondent can only be described as arbitrary, invidious, and unrelated to its representative functions, and therefore violative of Section 8(b)(1)(A) and (2) of the Act. I so find.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
2. Key Waterproofing Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. By causing Key to terminate the employment of Robert Gumbel at the Cairo jobsite in Cairo, New York, the Respondent has violated Section 8(b)(1)(A) and (2) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act, I shall recommend that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Since I have found that the Respondent unlawfully caused the Employer to terminate Gumbel, I shall recommend that the Respondent notify Key Waterproofing Company, Inc., and Gumbel in writing that it has no objection to Gumbel's employment by the Employer. I shall also recommend that the Respondent make Gumbel whole for any loss of earnings suffered by him as a result of the discrimination against him.[16] Loss of earnings shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

I shall also recommend that the Respondent be ordered to expunge from its files any reference to Gumbel's unlawful discharge and to notify Gumbel in writing of its actions as well as inform him that his unlawful discharge shall not be used as a basis for future action against him. Furthermore, I shall recommend that the Respondent be required to ask Key to remove from its files any reference to Gumbel's unlawful discharge and notify Gumbel that it has asked the employer to do so. See *R. H. Macy & Co.*, 266 NLRB No. 157 (May 23, 1983).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[17]

The Respondent, Bricklayers and Allied Craftsmen, Local 6, AFL-CIO, Albany, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Key Waterproofing Company, Inc., or any other employer to discharge or otherwise discriminate against Robert Gumbel or any other employee because of his failure to pay to the Union or the Union's funds moneys which the Union or the funds assert that said employee owes to them or because of any other arbitrary or invidious reasons.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Make Robert Gumbel whole for any loss of pay he may have suffered as a result of the discrimination against him in the manner set forth in the section entitled "The Remedy."

(b) Notify Key Waterproofing Company, Inc., in writing, and furnish a copy of such notification to Robert

[14] *Johnson's Plastering*, supra.

[15] *Longshoremen Local 440 (Port Arthur Stevedores)*, 214 NLRB 1068 (1974).

[16] While the facts are clear that the Respondent caused Key to discharge Gumbel from employment on the second phase of the job and not to hire him for the third phase at the Cairo jobsite, his status vis a vis the third phase is not sufficiently clear from this record. I shall therefore have the determination of whether Gumbel is entitled to backpay for the third phase of the job to the compliance stages of this proceeding. I note in this connection that the record suggests that Key would have hired Gumbel for this phase, if Kilcullen had been unable to complete it himself. Thus, among other factors, it must be determined when the third phase was completed and what Kilcullen's physical condition was at that time.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Gumbel, that it has no objection to Gumbel's employment by said Employer.

(c) Expunge from its records any reference to the unlawful discharge of Robert Gumbel and notify him, in writing, that this has been done and that evidence of his unlawful discharge shall not be used as a basis for future action against him.

(d) Post at its business office copies of the attached notice marked "Appendix A."[18] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's representative, shall be posted and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 3 for posting by the Employer at its place of business, in places where notices to employees are customarily posted, if the Employer is willing to do so, and ask the Employer to remove any reference to Gumbel's unlawful discharge from the Employer's files and notify Gumbel that it has asked the Employer to do this.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[18] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."